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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. 311

THE WASHINGTON TERMINAL COMPANY,
Petitioner

v.

ALONZO W. TAYLOR,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit; the denial of the Petition for Rehearing and Suggestion For Hearing En Banc are included in Petitioner's Brief as Appendix B, C, D.

The trial court did not explain, orally or in writing, how it arrived at the $60,000 remittitur figure, hence no opinion is available for the record.

JURISDICTION

The jurisdiction of this Court to review the final judgment of the Court of Appeals, entered on February 20, 1969 is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Was the Circuit Court of Appeals correct in reinstating a jury verdict in a Federal Employees Liability Act case where trial court ordered a remittitur of $60,000 of an $80,000 jury verdict without stated reasons, and where the evidence in the record supported the jury verdict, on the ground that trial court abused its discretion.

STATUTES INVOLVED

Rule 59(a) Federal Rules of Civil Procedure.

Rule (1) Federal Rules of Civil Procedure, 28 U.S.C. provides as follows:

SCOPE OF RULES

These rules govern the procedure of the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty with the exceptions stated in Rule 81.

They shall be construed to secure the just, speedy and inexpensive determination of every action.

STATEMENT

This case was tried before a jury under the Federal Employees Liability Act, as amended and the Boiler Inspection Act, 45 U.S.C. 1-23 and 51 et seq.

On August 14, 1967, the jury returned a verdict for respondent in the amount of Eighty Thousand Dollars ($80,000). The Boiler Inspection Act was eliminated from the case by a directed verdict for petitioner.

Pursuant to post trial motions and opposition thereto the trial court ordered a new trial unless respondent remitted

Sixty Thousand Dollars ($60,000.00), and in the event such remittitur was given, the motion for a new trial was denied. No opinion, oral or written, was stated for this order which was filed on September 26, 1967 by the trial judge.

Faced with an interlocutory and non-appealable order respondent proceeded to a second trial, and again, in spite of trebled effort, new lay and medical witnesses presented by the carrier, a jury on March 18, 1968 returned a verdict for the respondent stating they found the petitioner carrier 100% responsible for the accident (R. p. 2). Excerpt 2nd trial transcript.

The second jury found damages in the sum of Twenty-five Thousand Dollars ($25,000.00).

Respondent appealed the remittitur order when there was a final judgment.

On February 20, 1969 the Circuit Court of Appeals for the District of Columbia Circuit set aside the order for a new trial and ordered reinstatement of the original verdict for the respondent railroad employee on the grounds the trial judge abused his discretion.

Constitutional and statutory arguments against the remittitur device were not reached by the appellate court in arriving at its decision. (App. B. p. 3(a)(3)).

The Circuit Court in upholding respondent's argument that the trial court abused its discretion outlined some of the evidence that supported the jury verdict noting that respondent was in his middle thirties; that he had, as a result of the injury, an arthrodesis of the wrist locking it into a non-movable joint (App. p. 190); that he suffered constant pain of an intense character (App. 111); that post operatively, there was evidence of marked degenerative arthritis (App. p. 214); that his weight from the date of the accident, April 28, 1963, to date of trial, was reduced from 170 lbs. to 129 lbs. (App. pp. 105, 117); that he had been x-rayed approximately 100 times in the course of treatment (App. 1, p. 118); that he was treated by at least eight phy-

sicians (App. pp. 107, 110, 149, 153, 191); that there were deep penetrating scars in the wrist and stomach (App. pp. 91, 120); that he had as a result of the Billroth I operation twenty (20) metallic sutures within his body to affect the anastomosis after removal of 75% of respondent's stomach (App. pp. 162, 164, 198, 207, 217, 218); that he was hospitalized five times where he experienced pain and bleeding; that his health before and after the injury was markedly impaired; that he had lost 307 days from work; that his life expectancy was 39 years; that the future of the wrist and the stomach indicated continued pain and discomfort in the future; and the stipulated specials exceeded Ten Thousand Dollars ($10,000.00).

Respondent also pointed out the arithmetical result of the remittitur order which was non-compensatory as was the second jury verdict. Respondent's brief below at p. 27.

REASONS FOR DENYING THE WRIT

The decision of the Circuit Court below predicated solely on the abuse of discretion issue, without reaching the constitutional and F.E.L.A. statutory questions, diluted the importance of this case, and removed it from the category of cases which meet the criteria for certiorari set forth by this Court.

Petitioner suggests this case is important because it is concerned with the encroachment by appellate courts on the trial court's exercise of post trial discretion, and because it conflicts with recent pronouncements of this Court. Petitioner is unconcerned over the encroachment by the trial court on the constitutionally granted jury fact-finding functions, and the importance of that function in the implementation of the Federal Employees Liability Act established by the Congress and this Court: *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326 (1958), 78 S.Ct. 758; *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957); *Lavender v. Kurn*, 327 U.S. 653 (1946); *Tennant v. Peoria and Pacific Union Ry. Co.*, 321 U.S. 29 (1944); *Bailey v. Central Vermont R.R. Co.*, 319 U.S. 350 (1943).

The Petitioner's first erroneous contention is partially met by petitioner's concession at p. 7 of its petition where it concedes:

> "All federal circuits have adopted the view that orders granting or denying new trials may be reviewed only to determine whether there was an abuse of discretion."

The Court below did just that and nothing more.

But petitioner contends that the approach has been established if there is *some* support for the action of the trial judge in the record, the appellate courts cannot examine *all* of the evidence to determine the presence or absence of abuse.

In support of this theory petitioner says *Neese v. Southern Railway Co.*, 350 U.S. 77 (1955) and *Gruenthal v. Long Island R.R. Co.*, 393 U.S. 156 (1968) establish this restrictive policy.

Neither case is concerned with the narrow scope of appellate review suggested. Both cases were concerned with the preservation of a jury verdict granted to the injured railroad worker after a full trial of the issues under the Act.

In *Neese* this Court reversed when the appellate court viewed the "evidence" differently than the trial court and the Supreme Court. The result of the appellate court's ruling would have been to deprive the appellant of his jury verdict and subject him to the ordeal of a new trial on the damage question with all its attendant expense and delay. Rule 1 F.R.C.P. *Moreover, the trial court exercised its discretion with some degree of restraint.*

The key words are "the Court of Appeals was not justified, *on this record*, emphasis supplied, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from the question, *as we view the evidence*, emphasis added, we think the action of the trial court was not without support in the record."

In *Gruenthal* this Court said at p. 159:

> "We read Dagnello, however, as requiring the Court of Appeals in applying this standard to make a *detailed appraisal of the evidence bearing on damages.* Emphasis added.
>
> Indeed this re-examination led to the conclusion in *Dagnello* that it was not a denial of justice to permit the *jury's verdict to stand.* Emphasis added.
>
> * * *
>
> If the Court of Appeals made a similar appraisal of the evidence in this case, the details are not disclosed in the majority opinion beyond attaching *unexplained*, emphasis added, significance to petitioner's failure in his complaint to ask for damages in such a large sum as $305,000 the relevant discussion is limited to the bald statement that giving Gruenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in Dagnello we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000. *We have therefore made our own independent appraisal of the evidence.*" At p. 160. Emphasis added.

The petitioner's statement at p. 8 of its petition that:

> "Under this standard, the appellate court is not to independently appraise the evidence."

is totally disparate from this Court's construction of *Dagnello* and *Gruenthal* requiring the Court of Appeals to make a detailed appraisal of the evidence bearing on damages. *Gruenthal* at p. 159. And where the Court of Appeals does not do so or fails to explain the details of its findings this Court will make its own independent appraisal to determine the abuse of discretion question.

Thus the standard or criteria for the interference with a jury verdict, by remittitur, especially in a Federal Employees Liability Act case, where the jury has been entrusted by the Congress and the Supreme Court to the finding of

facts, including damages, *is a detailed, fully explained, independent appraisal of the evidence.* Emphasis added.

In the instant case it was the trial court that made no detailed appraisal of the evidence, nor did the trial court explain how it arrived at the reduction of the jury's verdict by $60,000. Respondent asserts it would have been, on the basis of the evidence in the record, logically and judicially well nigh impossible to do so. The carrier presented only one lay witness on the issue of liability and relied heavily on friendly cross examination of the railroad doctor who treated respondent. *This strategy failed in the first trial and was abandoned in the second effort.*

The Circuit Court of Appeals, in this case, followed the teaching of *Gruenthal* and made its own independent appraisal of the evidence, fully explained how the jury's verdict was supported by that evidence, and, as a consequence, reversed for abuse of discretion the trial judge's unexplained and unsupported action.

The adoption of the artificial and unrealistic standard suggested by the carrier in its petition would place unexplained substitution of verdicts by the trial courts, through the remittitur device, in a place of supremacy over jury verdicts.

The violence this does to the Constitution and the Federal Employees Liability Act is patent. It would also deprive appellate courts and this Court of examining in detail, all the evidence submitted to the jury, to determine whether or not the trial judge gave constitutional deference to the jury's decision and, in effect, erode all supervision in this regard.

No case decided by this Court, including those cited by petitioner, has ever advocated amost total abandonment of appellate safeguards against mistakes, irregularities, or whim and caprice of trial courts as long as (some) evidence can be found to support the remittitur practice.

Finally the local character of this case, in its present posture, is enhanced when the Circuit Court remarked at p. 70 of its opinion that:

> "*In this jurisdiction particularly*, [emphasis added] District Court judges have given great weight to jury verdicts. They have stated that a new trial will not be granted unless the 'verdict is so unreasonably high as to result in a miscarriage of justice' * * * or, most recently, unless the verdict is 'so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may operate."

The Circuit Court found, on the evidence in the record, that the trial judges' unexplained action, ignored these local criteria and fell within the scope of *Lind v. Schenly Industries, Inc.*, 278 F.2d 79; cert. denied 364 U.S. 835 (1960).

What was said by this Court in *Tennant v. Peoria, supra*, and *Gallick v. Baltimore and Ohio R.R. Co.*, 372 U.S. 108 (1963) seems dispositive of the dubious issue raised by the carrier:

> "It is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. *It is the jury not the court, which is the fact finding body.* It weights the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts.
>
> "The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Citing *Washington & Georgetown R. Co. v. McDade*, 135 U.S. 554, 571, 572; *Tiller v. Atlantic Coast Line, supra*, 68; *Bailey v. Central Vermont Ry.*, 319 U.S. 350 (1943).

> "That conclusion, whether it relates to *negligence, causation, or any other factual matter, cannot be ignored.* Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inference or conclusions or because judges feel that other results are more reasonable."

Moreover, the Circuit Court also stated (page 8(a) note 16 of its opinion) that it found no cases holding, and no scholarly comment suggesting, that the novel legal concept offered by the carrier rationalizing the remittitur order, had validity, especially since the trial judge made no statement that he relied on such a theory.

CONCLUSION

For the reasons stated the Writ of Certiorari should be denied.

Respectfully submitted,

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